80-5589

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

PATRICK SIMPSON,

Petitioner

vs.

THE STATE OF GEORGIA,

Respondent

ON WRIT OF CERTIORARI

TO THE

COURT OF APPEALS

OF GEORGIA

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IN THE

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OCTOBER TERM, 1980

NO. _____

PATRICK SIMPSON,

Petitioner

vs.

THE STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on June 2, 1980.

OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 154 Ga. App.,775(___SE2d___), and is set forth in Appendix "A".

JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on June 2, 1980. Thereafter, the Supreme Court of Georgia denied a timely filed Petiti n for Writ of Certiorari on September 2, 1980. Copy of said denial is set forth herein in Appendix "B". The Court's jurisdiction is invoked under Title 28, United States Code §1257 (3).

QUESTION PRESENTED

Once a State Court had determined that probation is the appropriate punishment for a particular offender, and also imposes a fine to be paid on installments during the probationary period, may it, consistently with the Equal Protection and Due Process clauses of the Fourteenth Amendment,

revoke the probation where the evidence established that the offender was indigent and that the offender was not negligent in any manner, and did not deliberately disburse or dissipate monies that resulted in his inability to pay?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution as well as Georgia Code Annotated 27-2901, are set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

PATRICK F. SIMPSON, hereinafter referred to as the petitioner, was placed on probation after being convicted of distribution of obscene materials. Simpson v. State, 144 Ga. App. 657. Petitioner's two (2) year probated sentence began to be served on August 21, 1978 under an order of probation requiring him to pay Five Hundred ($500.00) dollars per month until the Ten Thousand ($10,000.00) dollar fine was paid: (R-29, case No. 59871).

Petitioner on June 14, 1978 entered a plea of guilty to a charge of distribution of obscene materials and received a fine of Ten Thousand ($10,000.00) dollars and two (2) years on probation, and he was required to pay the fine at the rate of Five Hundred ($500.00) dollars per month. Therefore, both sentences were running concurrently, and the petitioner was to pay One Thousand ($1,000.00) per month on total fines of Twenty Thousand ($20,000.00) dollars. (R-44, case No. 59872.)

A petition for revocation was filed in each case and the sole ground for revoking the probation was that the petitioner failed to pay as directed. (R-45, case No. 59872) R-35, case No. 59871)

COURT OF APPEALS OF GEORGIA CASE NO. 59872

The first hearing was held on October 4, 1979 before Judge Dorothy T. Beasley. Steve Crawford, a probation officer, testified that Simpson had paid Two Hundred Ninety ($290.00)

dollars toward the fine of Ten Thousand ($10,000.00) dollars. (T-2) Petitioner's employer had written a letter to the judge and the probation officer in Brunswick stating that the petitioner was gainfully employed, doing a good job, and suggested a reduction in the fine. (T-3) Petitioner's employer also wrote a letter to the probation officer stating that Simpson was a good employee. (T-3)

The petitioner testified that he paid what he could afford, and that the company he had worked for when he was arrested assured him they would help. (T-4) Simpson testified his present take-home pay is Three Hundred Seventeen ($317.00) dollars every two weeks. (T-5) Because his roommate was not working due to a strike, he paid all the household bills which left him no money to pay on the fine. (T-6) Simpson stated he had no assets, and lives from pay check to pay check. (T-7)

Simpson testified that he tried to get a part-time job but none were available. (T-9)

The Court concluded that this petitioner violated the terms of the probation by not paying Five Hundred ($500.00) dollars per month as directed.

On November 1, 1979, another hearing was held and Steve Crawford gave the same testimony he had given at the October 4, 1979 hearing. Simpson's total payments on probation were One Thousand ($1,000.00) dollars per month (T-4), and the total payments were Two Hundred Ninety ($290.00) dollars.

The petitioner testified he had declared bankruptcy in January of 1978. (T-7) Petitioner's gross salary was about $600.00 per month up to June of 1979, and his net pay was about $525.00 per month. (T-8) He then received a raise of about $40.00 per month. (T-9) He had nothing left over from paying his expenses and he had no assets. (T-10) Simpson swore he did not squander any money, and on several occasions he had no money left to his next paycheck. (T-13) All his money went

r necessities, and he then detailed where his money went. (T-13-16) Simpson testified that before the raise his net pay was $596.00 per month and after it was $634.00 per month. (T-25-26).

No evidence or testimony was introduced nor was it shown that the petitioner was negligent in failing to pay his fine as directed. It was solely due to his indigency as to why he could not pay $500.00 per month on the fine imposed by Judge Beasley. The probation was revoked on the sole ground alleged in the petition for revocation that he failed to pay as directed, being $500.00 per month. (R-46)

COURT OF APPEALS OF GEORGIA CASE NO. 59871

A hearing was then held on November 1, 1979 before Judge William Alexander. Steve Crawford gave the same testimony as he had given before Judge Beasley. (T-8-12) The petitioner gave the same testimony that he had given before Judge Beasley. He lived from pay check and had no money left over to pay his fine. (T-17) The Court revoked his probation on the sole ground alleged in the petition for revocation that he failed to pay as directed, being $500.00 per month. (R-36)

REASON FOR GRANTING THE WRIT

I.

This Case Presents For Review An Issue Expressly Reserved By This Court In Tate vs. Short, 401 U.S. 395 (1971) and Williams vs. Illinois, 399 U.S. 235 (1970) - The Imprisonment of The Defendant For Failure To Pay A Fine On Installments Due To His Indigency After Being Placed On Probation.

In Tate vs. Short, 401 U.S. 395, 400 (1971), this Court stated that"

> "...Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in the circumstance must await the presentation of a concrete case."

In Williams vs. Illinois, 399 U.S. 235, 243 (1970), this court stated that:

"...We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction..."

This case appears to be the concrete case mentioned in Tate vs. Short, supra.

The Georgia Court of Appeals in Simpson vs. State, 154 Ga. App. 775 (___ SE2d___) held that for the reasons stated above, the court did not err in revoking defendant's probation even though his failure to pay the monthly installment of the fine was "not negligent or willful."

In Tate vs. Short, supra, this Court struck down a sentence that converted a fine into imprisonment due to the indigency of the defendant. Similarly in Williams vs. Illinois, supra, it was held that the term of imprisonment for an offense could not be extended beyond the maximum period fixed by law resulting directly from an involuntary nonpayment of a fine or court costs.

The fundamental question boils down to whether the sort of sentence an offender must serve may ever explicitly turn solely upon the amount of money he has. Griffin vs. Illinois, 351 U.S. 12, 19 (1956).

It is now clear that the conditional liberty of an offender who has been awarded probation is part of the library directly secured by the Fourteenth Amendment. Morrisey vs. Brewer, 408 U.S. 471 (1972); Gagnon vs. Scarpelli, 411 U.S. 617 (1973).

The evidence showed that the installment payments of $1000.00 per month on the fines were more than Simpson made in a month. Simpson's net pay was $634.00 a month. On these facts, the alternative offered the petitioner was, in effect, a nullity.

There is no "inverse discrimination" that is mentioned in Williams vs. Illinois, supra, and Tate vs. Short, supra, since the petitioner was serving his sentence on probation. He was reporting to his probation officer and was complying with the terms and conditions of his probation. He

was, in essence serving his sentence.

It should be pointed out that the fine is a judgement against the defendant, and the State can always levy against any property the defendant may own at a later time. Also, the State may file a garnishment against the salary of the defendant in order to collect the fine. Therefore, the petitioner is subject to paying the fine at a later time, and even after the probation period is over.

II.

There is a Conflict Between the Federal Courts And The State Courts.

In U.S. v. Boswell, 605 F.2d 171 (5th Cir. 1979), the Court held that a revocation of probation was erroneous if the defendant did not have the resources available, had no way to acquire them, and was not negligent or deliberate in allowing funds that he had to be disbursed or dissipated in a manner that resulted in his inability to pay. See also Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1979), vacated as moot, Hopper v. Barnett, 439 U.S. 1041 (1978).

Similarly in U.S. v. Taylor, 321 F.2d 339 (4th Cir. 1963), the Court held that if the defendant was too poor to pay the fines, and was sincere in trying to pay the fines, his probation should not be revoked.

In U.S. v. Savage, 440 F.2d 1237, 1239 (5th Cir. 1971) the Court held that a defendant:

"cannot be held to be in violation of the condition (of his parole) unless he is clearly at fault."

The Court held that the District Court could not revoke appellant's probation unless it is positively and clearly shown that the failure to meet the condition was due to the appellant's neglect or default.

In Hensley v. U.S., 257 F.2d 61 (5th Cir. 1958), the probation was properly revoked since the defendant had fraudulently transferred assets to avoid the payment of taxes.

The above cited federal cases clearly reflect that in order to revoke the probation of the defendant, he must be negligent in not paying the installment payments, or willfully refuses to pay the fine.

Georgia refuses to follow the Fourth and Fifth Circuits and continually holds that probation can be revoked solely because of the indigency of the defendant.

This conflict should be resolved and this case is the proper case for this court to provide a uniform rule of law for the United States.

The petitioner has not been negligent, and has not surrendered a fair opportunity to make the required installment payments.

To imprison the petitioner when in the same circumstances a person of means would remain free constitutes a denial of the equal protection of the law. The confinement results from failure to pay a fine on installments being directly converted into imprisonment. The defendant who is involuntarily unable to pay is subjected to imprisonment solely because of his indigency.

The trial court has determined that the petitioner need not be confined for his crimes and that the State's penal interests would be met by a fine to be paid in installments and probation. (See Ga. Code Ann. §27-2901) This is an individualized sentence and the petitioner certainly has no quarrel with the court's essential judgment. But to revoke the probation due to his indigency is irrational, unnecessary, and impermissibly barred them from the benefits which the court adjudged them worthy of. This violates due process of law.

The State must accomodate his indigency and permit him the same escape from confinement open to a defendant of means under the same sentence. It cannot offer probation only to those who can pay.

Whether a person can pay a fine on installments had no apparent relationship to punishment or to rehabilitation.

Simpson was a mere clerk in a bookstore. The imposition of substantial fines on this type of person can only result in the revoking of the probation sooner or later. The trial courts were fully aware of the financial situation of the petitioner when imposing the sentence.

If the probation sentence can be revoked in this case, then the probation sentence was illusory and amounted to the trial judge giving the petitioner a test of liberty for several months, but in effect was eventually giving him a sentence to serve in prison. Under the holding of Morrisey vs. Brewer, supra, the State Court is required to keep the petitioner on probation as he was clearly not at fault in failing to comply with the terms of probation.

Since we have a national constitution, the application of the constitution should be uniform in both the state and federal courts.

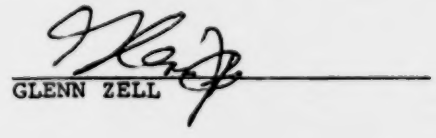
III.

This Court has granted certiorari in the case of Wood et al vs. Georgia, U.S. , 64 LE2d 807 (May 19, 1980, 79-6027) which involved the same issues as in this case. Therefore, the petition for Writ of Certiorari should be granted and remanded back to the Court of Appeals of Georgia after the Wood case has been decided.

CONCLUSION

This court needs to decide whether an indigent defendant's probation can be revoked where the monthly installments were not made due to his poverty and he was not negligent or willful in failing to pay as directed by the Court.

Respectfully submitted,



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PATRICK SIMPSON,

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vs.

THE STATE OF GEORGIA,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, PATRICK SIMPSON, ask leave to file the attached Petition for a Writ of Ceritorari to the Georgia Court of Appeals without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

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Counsel for Petitioners

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NO. _____

PATRICK SIMPSON, Petitioner

vs.

STATE OF GEORGIA, Respondent

A F F I D A V I T

I, PATRICK SIMPSON, being first duly sworn according to law, deposes and says, in support of my Motion For Leave To Proceed without being required to prepay costs or fees:

1. I am the petitioner in the above entitled case.
2. Because of my poverty, I am unable to pay the costs of said cause.
3. I am unable to give security for same.
4. I believe that I am entitled to the redress I seek in said case.
5. The nature of said cause is briefly stated as follows:

I was sentenced in the State Court of Fulton County on a charge of violation of the State obscenity law. The present proceeding was commenced according to 28 U.S.C. 1257(3) on the grounds that my constitutional rights were violated when the trial court revoked my probation for failure to pay the fine due to my indigency.

Patrick Simpson
PATRICK SIMPSON

Sworn and subscribed to
before me, this 20
day of October, 1980.

Notary Public
Notary Public, Georgia State at Large
My Commission Expires July 11, 1981

JUN 2 1980

59871, 59872. SIMPSON v. THE STATE

QUILLIAN, Presiding Judge.

The defendant appeals from the revocation of his probated sentence to confinement.

Defendant was convicted in two separate prosecutions, of three counts each, of distribution of obscene material. In each instance he received a sentence of two years confinement and a fine of $10,000. The confinement was probated on the payment of the $20,000 in fines at the rate of $1,000 per month. He failed to make the monthly payments and his probation was revoked. He brings this appeal. Held:

1. It is alleged that the trial court converted the defendant's probated sentence of confinement to imprisonment solely because of his indigency, and such conversion "violates the equal protection and due process

clauses of the Fourteenth Amendment of the U. S. Constitution . . ." We do not agree.

Citing Williams v. Illinois, 399 U. S. 235 (90 SC 2018, 26 LE2d 586); Morris v. Schoonfield, 399 U. S. 508 (90 SC 2232, 26 LE2d 773); and Tate v. Short, 401 U. S. 395 (91 SC 668, 28 LE2d 130), defendant contends he has been "treated differently" because he is financially unable to pay his fine. He argues that under Griffin v. Illinois, 351 U. S. 12, 19 (76 SC 585, 100 LE2d 891), the "fundamental question boils down to whether the sort of sentence an offender must serve may ever explicitly turn solely upon the amount of money he has?" Answering the last question first, the U. S. Supreme Court stated: "The [Supreme] Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate." San Antonio School District v. Rodriquez, 411 U. S. 1, 21 (93 SC 1278, 36 LE2d 16).

Contrary to defendant's argument, the trilogy of Williams-Morris-Tate, supra, does not prohibit the sentence imposed in the instant case nor the revocation of probation based upon the defendant's financial inability to pay the fine imposed. This legal triad proscribes typical sentences of $30 or 30 days, and the conversion of a fine into a sentence of confinement at a rate of so many dollars per day - which exceeds the maximum amount of confinement authorized by the statute. However, we have neither situation in the instant case. See Calhoun v. Couch, 232 Ga. 467 (2) (207 SE2d 455).

In essence, the Williams-Morris-Tate cases held that "the Due Process and Equal Protection Clauses protect persons like petitioner from inviduous discrimination" because of their indigency. See Griffin v. Illinois, 351 U. S. 1218, supra. Our Supreme Court, in Hunter v. Dean, 240 Ga. 214 (239 SE2d 791), thoroughly examined the issue of conditionally probated sentences upon payment of a fine and concluded that they are "not necessarily inviduous discrimination" even though defendant may be unable to pay the fine. See also Barnett v. Hopper, 234 Ga. 694 (217 SE2d 280).

Under Code Ann. § 27-2711 (Ga. L. 1956, pp. 27, 32; as amended through 1965, pp 413, 416), the sentence imposed in the instant case was within the permissible conditions of probation. The financial inability of the defendant to pay the monthly installment when due did not convert the monetary portion of the sentence to imprisonment, but merely invoked the previously imposed confinement portion of the sentence. This is not inviduous discrimination. Wood v. State, 150 Ga. App. 582, 583 (258 SE2d 171); Young v. State, 152 Ga. App. 108 (1) (262 SE2d 258); Calhoun v. Couch, 232 Ga. 467, 468, supra; Barnett v. Hopper, 234 Ga. 694, supra; Hunter v. Dean, 240 Ga. 214, supra. This enumeration is without merit.

2. For the reasons stated above, the court did not err in revoking defendant's probation even though his failure to pay the monthly installment of the fine was "not negligent or willful." See Hunter v. Dean, 240 Ga. 214, supra; Wood v. State, 150 Ga. App. 582 (2), supra.

Judgment affirmed. Shulman and Carley, JJ., concur

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta SEP 2 1980

Dear Sir:

Case No. 36557. Patrick F. Simpson
v. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Pertinent provisions of the Fourteenth Amendment are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Georgia Code Ann. §27-2901:

"Every fine imposed by the Court under the authority of this Code shall be paid immediately or within such reasonable time as the court may grant."

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STATE OF GEORGIA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

In cases arising in the criminal justice system, should lack of wealth be a suspect classification for purposes of equal protection analysis?

2.

May a trial judge,who has made a determination that probation is the appropriate punishment for one convicted of a crime, later revoke that probation for the nonpayment of the fine which was to have been paid in installments during the period of probation when during that period no payments are made, nor has the offender made any effort to comply with this term of his probation?

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ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, Patrick Simpson, was placed on probation under Georgia's Statewide Probation Act, Ga. Code Ann. § 27-2709, following his convictions under the state's obscenity statute, Ga. Code Ann. § 26-2101.

On March 24, 1977, after having been tried and found guilty on three counts of distributing obscene material, Simpson was sentenced to an aggregate of twenty-four months imprisonment and a fine of $10,000.00. The sentences were probated on condition that Simpson abide by the terms of his probation order. The convictions and sentences were affirmed in Simpson v. State, 144 Ga. App. 657, 242 S.E.2d 265 , appeal dismissed for want of a substantial federal question, 439 U.S. 887 (1978).

On June 14, 1978, Simpson again was convicted in State Court of Fulton County pursuant to his plea of guilty to an indictment containing three counts of distributing material. His aggregate sentence was twenty-four months and $10,000.00; the sentences were probated conditioned on payment of the $10,000.00 fine at the rate of $500.00 a month and other conditions set out in the probation order. Apparently no appeal was taken.

On the same day that he entered a plea of guilty to the second indictment, Simpson moved for reduction of fine on the first conviction. The motion was denied.

Thereafter, there was filed a petition to revoke probation on the first conviction and sentence as a result of his conviction on the second obscenity distribution charge, a violation of the conditions of probation. As a result of this action, the original sentence was probated on condition Petitioner abide by the terms of the order and that he pay $500.00 a month on the $10,000.00 fine.

Petitioner failed to abide by the conditions of his probated sentence and, after separate hearings on November 1, 1979, both sentences of probation were revoked and Petitioner required to serve his sentence in confinement. These actions were appealed and affirmed. Simpson v. State, ___Ga. App. ___, ___S.E.2d___ (Case Nos. 59871 and 59872, decided October 31, 1981).

Evidence adduced at the probation revocation hearings demonstrated that Petitioner had made less than a good faith effort to comply with the conditions of probation. First, while under a probated sentence requiring him not to violate the laws of Georgia, Petitioner was arrested on similar charges to those for which he was probated. He was, again, convicted. Second, from June 1978 until his probation was revoked in November 1979, Petitioner had paid a grand total of $290.00. Months passed with no effort whatsoever at making payment. (T. 13).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

INTRODUCTION

This Court has granted certiorari in Wood, et al. v. Georgia, Case No. 79-6027. This Court's decision in Wood will be dispositive of the issues presented in the instant case. Two issues arise: the first, whether economic disadvantage should be a suspect classification for purposes of equal protection analysis in these circumstances, is implicit in the petition; the second is whether the financial resources available to a criminal defendant is a relevant factor in determining whether one is a good risk for a probation. The remaining portions of this brief will address those two issues.

I. ECONOMIC DISADVANTAGE HAS NOT BEEN ACCEPTED AS A SUSPECT CLASS FOR THE PURPOSES OF EQUAL PROTECTION ANALYSIS IN AREAS OF THE LAW ARISING OUTSIDE THE ADMINISTRATION OF CRIMINAL JUSTICE.

The Equal Protection Clause has always been thought to allow differences in treatment, even with some resulting inequality, as long as the state's purpose can be rationally justified. McGowan v. Maryland, 366 U.S. 420, 425 (1961). Absent invidious discrimination, a rationally based classification does not run afoul of the Equal Protection Clause. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 207 (1976); Dandridge v. Williams, 397 U.S. 471, 485 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

Petitioner implicitly argues that poverty is a suspect classification and, therefore, imprisonment for failure to pay a fine which is a condition of probation should be subjected to strict judicial scrutiny. This Court has viewed certain classifications as inherently suspect and subjected such suspect classifications to strict judicial scrutiny. See, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964) [race]; Loving v. Virginia, 388 U.S. 1, 9 (1967)[nationality]; Graham v. Richardson, 403 U.S. 365 (1971) [alienage]. However, economic disadvantage in itself has not been identified as a suspect classification for purposes of equal protection analysis. Maher v. Roe, 432 U.S. 461, 471 (1977); San Antonio School District v. Rodriguez, 411 U.S. 1, 29 (1973); Dandridge v. Williams, 397 U.S. 471, 484-85 (1970).

While those who are economically disadvantaged may be confronted with an imposing wall of finances which keeps them from the life-style which they may aspire to, and while the fact that their financial resources are less than those of the more affluent individuals in society, therefore causing them to undergo greater economic hardship, this alone does not constitute a violation of the Equal Protection Clause. In fact, government regulations sometimes present a financial difficulty for the economically disadvantaged who seek to take advantage of a benefit or service which those who are financially independent can easily pay; yet, prepayment of certain fees can be exacted from all individuals regardless of their financial status. United States v. Kras, 409 U.S. 434 (1973) [prepayment of fees for those who seek to file petitions in bankruptcy]; Ortwein v. Schwab, 410 U.S. 656 (1973) [filing costs in civil appeals]. This Court has found that states need not fund abortions for indigent women simply because childbirth is funded, Maher v. Roe, supra, nor must a state in its educational system require precisely equal expenditures per pupil between the affluent and less affluent school districts, San Antonio School District v. Rodriguez, supra, nor must it provide additional money because a welfare recipient has more children than the maximum number for which welfare payments can be made, Dandridge v. Williams, supra. That there is an adverse effect on those of slight financial means does not render poverty a suspect classification for the purposes of equal protection. See, e.g., Arlington Heights v. Metro Housing, 429 U.S. 252 (1977).

This Court has not been insensitive to those who are economically disadvantaged; however, in none of the cases in which the equal protection clause has been applied has the Court labeled indigency

a suspect class. What the Court has done is examine state statutes and practices which place the indigent at a disadvantage in the criminal justice process, invalidating those procedures supported by no rational basis.

In Berman v. United States, 302 U.S. 211 (1937), poverty in the context of probation was not found to require stricter judicial scrutiny:

> . . . Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence "comes as an act of grace to one convicted of a crime." [citation omitted]. The considerations it involves are entirely apart from any re-examination of the merits of the litigation. Probation was designed "to aid the rehabilitation of a penitent offender"; "to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable." Thus probation cannot be demanded as a right. "The defendant stands convicted; he faces punishment, and cannot insist on terms or strike a bargain." [citation omitted].

Id. at 213. Consequently, while Griffin v. Illinois, 351 U.S. 12 (1956), requires a higher degree of scrutiny in matters relating

to a defendant's effective access to review a finding of guilt, the review of a matter of probation, payment of a fine, and ultimate confinement because of a failure to meet a condition of probation does not involve any fundamental interest requiring stricter judicial scrutiny.

To date the Court has made it clear that economic disadvantage is not accepted as a suspect class for purposes of equal protection analysis in areas of the law arising outside the administration of criminal justice; as such, economic status in itself is insufficient to trigger strict judicial scrutiny in criminal cases.

II. THE FINANCIAL RESOURCES AVAILABLE TO A DEFENDANT IS ONE RELEVANT FACTOR IN DETERMINING WHETHER HE IS A GOOD RISK FOR PROBATION. PERMITTING A TRIAL JUDGE TO WEIGH THIS FACTOR IN DETERMINING WHETHER PROBATION IS APPROPRIATE, AND ON WHAT CONDITIONS, FURTHERS THE BROAD SENTENCING DISCRETION NECESSARY FOR AN EFFECTIVE CRIMINAL JUSTICE SYSTEM AND CONTRIBUTES TO THE EFFICACY OF A PROBATION SYSTEM WHICH, TO BE EFFECTIVE, MUST HAVE A BROAD BASE OF PUBLIC SUPPORT.

The present case, as Wood, does not involve imprisonment for the immediate failure to pay a fine, Tate v. Short, 401 U.S. 395 (1971), or imprisonment beyond the statutory maximum as a penalty for the failure to pay a fine. Williams v. Illinois, 399 U.S. 235 (1970). Petitioner is not being held beyond the statutory maximum penalty; rather, his basic claim must be that he has a right to probation. Having been duly convicted, in one instance by a jury and in the second instance by plea, and having completed appellate review, any liberty interest which Petitioner may have had has been extinguished. Meachum v. Fano, 427 U.S. 215 (1976).

At issue here is an examination of the sentencing function of a trial judge. The importance of the sentencing function cannot be over emphasized, since this is the area by which the public assesses the success or failure of the criminal justice system. Whether the sentence is too short, too long, or otherwise inappropriate for the offense, may later lead the criminal defendant

to repeat his criminal endeavors, beget new criminal offenses, or result in others committing crimes because they see that the penalty meted out in the past has not outweighed the gain they perceive as a result of criminal endeavors. If the public perceives an absence of sanctions for those who violate conditions of probation, it seems obvious the public will view probation as a useless sentencing alternative. Similarly, if courts are unable to enforce conditions of probation then probation may cease to exist as a useful rehabilitative alternative.

Sentencing should be appropriate to the individual and the crime. Williams v. New York, 337 U.S. 241 (1949). In deciding the appropriate sentence for one convicted of a crime, there are many factors which the trial judge must weigh. By virtue of his office and the necessary exercise of discretion in performing his functions, a trial judge may often face dilemmas in weighing those factors. Family history, educational achievement, employment opportunities, community ties, the nature of the crime, and the record of the offender are all matters which the trial judge takes into consideration.

In considering probation, the trial judge must reach some conclusion on whether a defendant is a good risk. In assessing risks, prior criminal history should be examined to indicate whether the offender has in the past given any indication that probation would not be successful. The judge may also consider family and family support. In every case the judge must ask the question whether the offender can succeed on probation. Ultimately, only the defendant can insure a successful probation; the responsibility is his.

When a defendant and those persons who are interested in his welfare directly participate in insuring the success of probation in an effort to avoid imprisonment, that responsibility increases. The employment potential of the probationer provides the sentencing judge with some assurance that the offender has an added stake in the success of probation. A fine sometimes accomplishes the same purpose.

Regardless of whether the fine is paid in advance or in installments, it provides an assurance to the sentencing judge that the potential probationer will have a greater responsibility in conforming his conduct to the law. Naturally, the fear of revocation and possible imprisonment has an immediate impact on the probationer and may serve as a curb to overcome any temptation to violate the terms and conditions of probation. The payment of a fine provides a probationer with a heightened interest in the success of his probation.

The court may also legitimately consider the offender's ability to pay the fine; the court may consider offers of payment from family members or from the offender's employer. There is some indication in the testimony at the revocation hearings that Petitioner expected such assistance in this case. (T. 27). Certainly the interests of a probationer's employer in the probationer's welfare,evidenced by a willingness to pay or assist in paying a fine, is a factor which a sentencing judge can and should consider. Payment of a fine by an employer is similar to payment of a fine by family members or friends. Such support is clearly an important consideration in assessing the probability of a given probationer's success.

When the assurances that prompt a trial judge to impose a conditional probated sentence do not materialize, the factors

which determine the probation-worthiness of the offender are no longer present. Consequently, the basis of the judge's decision to grant probation has been materially altered and must be reassessed. When the assuring factors which were present when the judge imposed probation fail to materialize the defendant thus becomes a poor risk for probation. When the conditions surrounding the reassuring factors to insure success on probation cannot be satisfied, the probation does not become effective and the sentence must be served.

Generally, the availability of financial resources to a criminal defendant is not a controlling factor in terms of whether the individual is a good risk for probation. It is the nature of the crime and the record of the offender that is crucial. However, in cases such as this, the availability of financial resources is certainly an important factor; it is a rational factor.

The sentencing discretion provided to trial judges should not be limited. The availability of financial resources to the offender plays an appropriate role in the exercise of that discretion. The presence or existence of economic resources will play a minor, if not nonexistent, role in many cases, but in some few cases it plays an important role. Restrictions of the sentencing discretion given to trial judges should not as a general rule be applauded. In this case restrictions on sentencing serve only to frustrate the state's interest in maintaining an effective criminal justice system.

The mere possibility that some judges will abuse the discretion with which they are entrusted should not be a sufficient basis to limit the discretion of all judges. In Georgia, to curb any

abuses which may occur during sentencing, the General Assembly has adopted a Sentence Review Panel to review all sentences of five years or more for harshness. Ga. Code Ann. § 27-2511.1. Cf. Williams v. New York, 337 U.S. 241, 251-52 (1949). The consequences of limiting a judge's sentencing discretion are unthinkable. If a judge cannot impose a period of probation because he has no means of enforcing violations of probation then many defendants would find themselves confined without the opportunity to demonstrate their probation-worthiness by putting up a financial stake. Cf. Tate v. Short, 401 U.S. 395, 401 (1971)(Blackmun, J., concurring).

The Supreme Court of Georgia in Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed as improvidently granted, 439 U.S. 281 (1978), recognized that assurance of third party help is rational factor for a trial judge to consider in determining probation. Id. at 218. See also Calhoun v. Couch, 232 Ga. 467, 207 S.E.2d 455 (1974).

The use of installment plans for the payment of a fine was recognized in Williams v. Illinois, 399 U.S. 235, 245, n. 21 (1970), which cited with approval statutes in California, Michigan and Pennsylvania. The California statute permitted the payment of a fine in installments with imprisonment in the event of default, but for no longer than the maximum term for which the defendant might have been sentenced. Id. at 247. The Court went on to say that a state cannot fail to enforce fines against indigents because to do so would amount to inverse discrimination. Id. at 244.

Public perception of the success or failure to the criminal justice system is a direct result of the exercising of the sentencing function vested in the trial judge. Permitting the

judge to have wide sentencing discretion in terms of conditional releases such as probation, restitution, and other postconviction sentencing alternatives must have a broad base of public support. Recognition that the public has a keen interest in and awareness of the effectiveness of the criminal justice system was evidenced in this Court's 1976 opinions concerning capital punishment. Cf. Gregg v. Georgia, 428 U.S. 153, 179-80 (1976)(plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 352-53 (1976) (White, J., dissenting). Sentencing alternatives which do not provide for confinement are particularly susceptible to public scrutiny, and when those alternatives are viewed as ineffective the public reacts in seeking a legislative termination to such programs.

As the rate of crime continues to spiral, many states have found themselves confronted with the decision of whether mandatory sentencing procedures should be envoked. In the last several years the movement towards mandatory sentencing has increased.

Maintaining public confidence in Georgia's Statewide Probation Act is one of utmost importance if Georgia is to achieve another legitimate objective, the rehabilitation and punishment of offenders outside the confines of a penal institution.

CONCLUSION

In summary, indigency or poverty is not a suspect classification for equal protection analysis.

It is evident that in some circumstances it is necessary for a sentencing judge to assess the financial resources available to an offender to ensure that he is a good probation risk. Such an examination furthers the undeniable rational and legitimate state interest in investing trial judges with a broad sentencing discretion. Consideration that payment will be made in whole or part by a third party strengthens the probability of an offender's chances for a successful probation.

In assuring trial judges a broad sentencing discretion another rational and legitimate state interest is promoted: maintaining public confidence in a conditional release system.

The relationship between any classifications drawn and the purpose for which they are drawn is clear and rational. Under traditional equal protection analysis such classifications are legitimate and acceptable and do not offend the Constitution. Consequently, the judgment of the Court of Appeals of Georgia should be affirmed.

Respectfully submitted,

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